THE SHERMAN ANTI-MONOPOLY ACT AND PROPOSED AMENDMENTS.

The Sherman Anti-Monopoly Act, approved July 2, 1890, was one of a series of enactments which during the last thirty years have been popular with the noisy part of the American people. An abuse is discovered. Immediately a cry is raised against the use of the thing which has been abused, and an application is made to the Legislature to prohibit its use altogether.

In the case of the Sherman Anti-Monopoly Act, the abuses were manifold and certainly did require remedial legislation. Before considering the amendments to this Act which have been proposed, it will aid us to follow the familiar rule for the construction of statutes, and consider the occasion and necessity of the law, the mischief felt, and the objects and the remedy in view.

Experience showed a tendency among the holders of capital to combine. These combinations in many instances, as in the case of railroads, were of public benefit, and tended to facilitate the business of the country, and had greatly reduced the cost of transportation. But other combinations had attempted to drive competitors out of business, not by producing a better article or selling continuously at a lower price, but by methods which, whether tolerated or not at common law, were morally indefensible. To use the language of Mr. Justice Holmes in his dissenting opinion in the *Northern Securities Case*[1]:

> "The objection * * * was not the union of former competitors, but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared."

This "ferocious extreme of competition" had been exercised in various ways. One was that proved in the *Dressed Meat Case*.[2] Here a combination would put up prices at the stock yards for a few days, with the object of inducing large shipments of cattle. When these shipments had arrived the price would be dropped, and thus the price to the producer was steadily kept down. As part of the same device, the parties to the combination agreed to

[1] (1904) 193 U. S. 197, 405. [2] Swift *v.* U. S. (1905) 196 U. S. 375.

avoid bidding against each other, to restrict shipments, and to refuse to sell to dealers who would not agree to buy exclusively from the combination.

Another method adopted by these combinations was to ruin a competitor by putting the price of the commodity he dealt in down to a point at which there was no profit in the business, using the advantage of the combination's larger capital to maintain this low price until the competitor was excluded from the trade. Then the price was raised. Another method resorted to was to fix the price of a commodity by agreement between the parties and refuse to sell to any persons who were not members of the combination.[3]

It was unfortunate that the legal advisers of the Government did not confine their proceedings to cases of this description. They were frequent. They caused great injury to the public, and they had the result of driving small dealers out of business. But one of the first actions brought by the Attorney-General under the power given by the fourth section of the Sherman Act was brought to restrain the enforcement of an agreement made by railroad companies west of the Mississippi, to enable them to carry out the provisions of the Interstate Commerce Act in regard to the uniformity of rates.[4]

In these cases the Supreme Court held that it would enforce the provisions of the Act without limitation by judicial construction. This construction of the Act is perhaps most clearly expressed in the recent case of *New York, New Haven & Hartford R. R.* v. *Interstate Commerce Commission.*[5] Here the Chesapeake & Ohio R. R. Co. made a contract with the New Haven Railroad by which the former was to sell coal to the latter at a price which would net the former less than the published rates for carrying coal. The Court held this to be illegal. The Chesa-

[3]This was the method adopted in Montague *v.* Lowry (1904) 193 U. S. 39.

It was substantially adopted in the cases of the City of Atlanta *v.* Chattanooga Foundry & Pipeworks (1903) 127 Fed. 23; (1906) 203 U. S. 390; U. S. *v.* Addyston Pipe & Steel Co. (1899) 175 U. S. 211; and U. S. *v.* Coal Dealers' Ass'n of California (1898) 85 Fed. 252.

Perhaps the first recorded instance is in the book of Revelation, XIII, 17: "That no man might buy or sell, save he that had the mark, or the name of the beast."

[4]U. S. *v.* Trans-Missouri Freight Ass'n (1897) 166 U. S. 290. A similar decision is U. S. *v.* Joint Traffic Ass'n (1898) 171 U. S. 505.

[5](1906) 200 U. S. 361.

peake & Ohio Company claimed that its dealings in coal would stimulate the production of coal, encourage an industry which was tributary to the railroad, and thus indirectly benefit the whole territory of which it was the outlet. On this contention the Court said[6]:

"We think it is shown that the mode of dealing adopted was simply the result of a disregard by the Chesapeake & Ohio of the economic conceptions upon which the Interstate Commerce law rests, and the substitution in their stead of the conceptions of the Chesapeake & Ohio, as to what was best for itself and for the public."

It is true that this decision was based upon the Interstate Commerce Act. But the principle thus expressed is distinctly that which the Court had adopted in construing the Sherman Anti-Monopoly Act. Perhaps the only limitation upon the general terms of that Act which the Supreme Court has held to be implied is this: a combination to fix the prices of patented articles and the terms upon which they may be used, is held not to be illegal.[7]

Another limitation which it was sought to import into the Act was an application of the rule of the common law that a person selling a business could lawfully make a contract that he would not engage in competition with his vendee. It is quite possible that in case of a sale by a private citizen this rule may still be applicable. But it would seem to follow from the decision in the *Northern Securities Case*[8] that it does not apply to a sale by a corporation nor to a corporation formed for the purpose of acquiring the stock of other corporations. The doctrine of this case has been so much discussed and is so familiar to the profession that it seems unnecessary to do more than refer to it.

It will be seen from this brief review of the decisions under the Sherman Act that it has been extended to prohibit contracts which were not within the mischiefs at which its framers aimed. On the other hand a construction has been given to the seventh section which certainly limits very seriously the right of action given by that section. This gives a right of action to an individual for an injury to "his business or property," by reason of anything

[6]P. 398.

[7]Bement *v.* National Harrow Co. (1902) 186 U. S. 70; Rubber Tire W. Co. *v.* Milwaukee etc. Co. (1907) 154 Fed. 358.

[8](1904) 193 U. S. 197.

forbidden or declared to be unlawful by the Act, and gives to the injured party the right to recover "three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." Here again it may justly be said that the language of this Act is too sweeping. It is quite conceivable that there might be technical violations of the Act for which it would be unjust to award treble damages. But on the other hand it is obvious that in many cases it would be impossible for a plaintiff who had been driven out of business to give any precise evidence of the amount of his injury. In the case of *Montague* v. *Lowry*,[9] for example, the plaintiffs, by the combination there under consideration, were driven out of the business of dealing in tiles. How much they would have added to their general business had they been able to continue dealing in tiles, manifestly it would be hard to prove. The verdict in that case was for $500 only. Any one who reads the statement of facts will perceive that the actual damage to the plaintiffs must have been very much larger, and that the trebling of the verdict even did not give adequate compensation.

In a recent unreported decision of Judge Hough in the U. S. Circuit Court for the Southern District of New York, it was held that damages were not recoverable when a business was broken up by a combination which had been made illegal by the Sherman Act, unless the competitor driven out of business had actually begun to market his product. This was put on the ground that it could not be shown how much he would have marketed, and what profit he would have made on the amount so dealt in. From the judgment entered on this decision a writ of error has been prosecuted, and it would therefore be unbecoming to discuss the subject at length. Attention is, however, drawn to it because of the obvious difficulty of proving damages in such case, even if they are recoverable when proved. If not recoverable there is obviously a defect in the statute. The tort is quite as great if it destroy *ab initio* a business which the law was intended to protect.

One other application of the Act which was probably not foreseen by its framers, must be considered before we take up the question as to the amendments that are proposed. It was held by the courts as long ago as 1893,[10] that the Sherman Act was

[9] (1904) 193 U. S. 38.

[10] Waterhouse *v.* Comer (1893) 55 Fed. 149, 156.

applicable to Trades Unions, and that any rule made by such a Union in violation of the terms of the Act was obnoxious to its provisions. This doctrine has very recently been approved and enforced by the Supreme Court in the *Danbury Hatters Case.*[11] This last decision aroused public attention. It is not perceived how the court could well have decided otherwise, in view of the express language of the Act, and in view of its previous decisions that it would enforce the Act according to its terms. These decisions were certainly in accordance with the well-settled rule for the construction of statutes stated by Chancellor Kent:

"General words in the statute must receive a general construction, and if there be no express exception the Court can create none."[12]

Accordingly, after much consideration a bill was introduced in the House of Representatives, March 23, 1908, "to regulate commerce among the several states or with foreign nations and to amend the act approved July 2, 1890, entitled 'An Act to protect Trade and Commerce against Unlawful Restraints and Monopolies.' This bill proposes to amend the Sherman Act by authorizing all corporations except those subject to the Interstate Commerce Act (that is to say common carriers) to register with the Commissioner of Corporations and to file with him a copy of any "contract or combination hereafter made other than a contract or combination with a common carrier." The Commissioner of Corporations, with the concurrence of the Secretary of Commerce and Labor, "may enter an order declaring that in his judgment such contract or combination is in unreasonable restraint of trade or commerce among the several states or with foreign nations." If no such order is made the contract is valid "unless the same be in unreasonable restraint of trade or commerce among the several states or with foreign nations."

The bill further provides that a common carrier may file with the Interstate Commerce Commission a copy of a contract or combination hereafter made. Thereupon the Interstate Commerce Commission may enter an order "declaring that in its judgment such contract or combination is in unreasonable restraint of trade or commerce among the several states or with foreign nations."

[11] Loewe *v.* Lawlor (1908) 208 U. S. 274.

[12] Demarest *v.* Wynkoop (1817) 3 Johns. Ch. at p. 142. To the same effect are Chamberlin *v.* Western Transportation Co. (1870) 44 N. Y. 305, 309; The Marianna Flora (1826) 11 Wheaton, 1, 39.

If no such order is made, no suit by the United States will lie respecting the same unless it "be in unreasonable restraint of trade or commerce among the several states or with foreign nations." This proposition introduces a novel element into federal legislation. It should not on that account be rejected, but it should on that account be scrutinized. In effect it authorizes an officer of the Federal Government to license a contract which is in reasonable restraint of trade, notwithstanding the fact that such contract is prohibited unless it is licensed, and it gives to the officers of the Federal Government very great power in the matter of the decision whether or not such contracts are or are not reasonable. The right to review the action of the Commissioner of Corporations is given to the Supreme Court of the District of Columbia. But no right is expressly given to review the decision of the Interstate Commerce Commission. Probably the Court would review such action without express grant of power. That Commission is certainly a quasi-judicial tribunal, whose decisions are entitled to great respect. If the power to license contracts by common carriers in restraint of trade should be lodged anywhere, that would seem to be the proper tribunal in whose hands the power should be placed. It is equally clear that there should be power somewhere to permit such contracts as were made by the Trans-Missouri Traffic Association. But the question recurs whether it would not be better to define in the Act itself the contracts which are deemed to be in reasonable restraint of trade, and to authorize those in express terms.

It has been said that no corporation is bound to avail itself of the provisions of this amendment, or to register in pursuance thereof unless it choose. That is perfectly true. But the compulsion to register created by the drastic provisions of the original Sherman Act is so great, that probably most corporations of importance would feel obliged to register under the Act if it should become a law. It may fairly be questioned whether the machinery of the Act does not impose upon the officers of the Government a burden much greater than that defensible upon any theory of wise legislation.

The bill then proceeds to take away the right to treble damages given by the seventh section of the original Act. No good reason is perceived for this particular change. There is no instance in which excessive damages have been recovered under the provisions

of the Sherman Act. In *Montague* v. *Lowry*, as has been pointed out,[13] the damages were probably inadequate. If the ruling of Judge Hough should be sustained, recovery in many cases would be nominal. If this section is to be altered, it would seem to be wiser in cases where a wilful violation of the Act should appear and a wilful tort should be proved, to give to the jury the right to find a verdict for exemplary damages. In this way compensation might be made for a wilful wrong which would be fairly adequate.

One further question remains to be considered. The constitutionality of the proposed legislation has been assailed on the ground that Congress has no right to delegate its power in the premises. This objection would seem to arise from a misapprehension of the scope of the proposed legislation.

The legislature may constitutionally entrust to a commissioner or officer of the Government power to make regulations for the enforcement or application of general rules prescribed by statute, and the regulations so adopted have the force of law. The regulations prescribed by the Secretary of the Treasury in reference to the importation of foreign goods, and the payment of duties thereon have the force of law.[14] Regulations adopted by the commissioners of pilots, pursuant to authority conferred by statute, are binding.[15] Regulations adopted by the Secretary of the Treasury fixing the authority of agents of the Secret Service Division have the force of law.[16] The power conferred on the Secretary of the Interior to make rules respecting cutting timber on the Government lands is not a delegation of legislative power. The rules will be enforced by the courts.[17]

The whole body of Civil Service legislation rests on this principle. The action of the Executive in prescribing regulations pursuant to these statutes is constitutional.[18]

The action of the Executive in such cases is subject to review by the courts. The courts will not, however, review this decision in a collateral suit, as, for example, in a taxpayers' action.[19]

[13] P. 455.

[14] Gratiot *v.* United States (1846) 4 How. 80; *Ex parte* Reed (1879) 100 U. S. 13.

[15] Sturgis *v.* Spofford (1871) 45 N. Y. 446.

[16] United States *v.* Fuelhart (1901) 106 Fed. Rep. 911.

[17] United States *v.* Williams (1887) 6 Mont. 379.

[18] Opinion Sup. Ct. Mass. (1885) 138 Mass. 601; Butler *v.* White (1897) 83 Fed. Rep. 578; People *v.* Civil Service Boards (1886) 103 N. Y. 657.

[19] Chittenden *v.* Wurster (1897) 152 N. Y. 345.

The subject was fully considered in the case last cited. On page 363 the Court said:

> "If the Mayor refuses to do his duty, or if he does it improperly, he may be compelled by direct proceeding, as by mandamus, or perhaps in some cases by certiorari, instituted by any resident citizen, to do it in accordance with the requirements of the Constitution and of the statute. The courts have the power to compel the discharge of such duties."[20]

In cases of removal the rule is thus stated in *People* v. *Brady*.[21]

> "The reasons assigned for the removal must appear, upon their face, to justify the action; in other words, they must be substantial and not frivolous, but when they appear to be sufficient to justify the determination the courts have no power to interfere on the ground that the reasons, though good in themselves, had no existence as matter of fact, or that the explanation given by the subordinate should have satisfied the head of the department."

Under the Interstate Commerce Law there have been numerous decisions in suits which involved a review by the courts of the validity of the orders of the commission. But this review is expressly provided for by Section 16 of the Act, which makes the findings and order of the commission *prima facie* evidence of the facts therein stated. Additional evidence is taken before the court in the proceeding to enforce the order of the commission. This is really in the nature of a new trial, subject to the qualification that in the absence of new evidence the findings of the commission would be sufficient evidence of the facts.[22] These decisions therefore do not aid us much in the consideration of the general question. They rest upon the terms of the Act itself.

The cardinal rule which should be observed in framing anti-monopolistic legislation should be that which Chief Justice Jay declared to be one of

> "the great and leading principles of a free and equal national government, one of the great objects of which is to insure justice to all: To the few against the many, as well as to the many against the few."[23]

[20]A review in such cases will be had only where there has been plainly an abuse of discretion. *People* v. *McWilliams* (1906) 185 N. Y. 92; *Matter of Dill* (1906) *ibid.* 106.

[21](1901) 166 N. Y. 44.

[22]Western New York Co. *v.* Penn. Refining Co. (1905) 137 Fed. Rep. 343; 70 C. C. A. 23; Tift *v.* Southern R. Co. (1905) 138 Fed. Rep. 753, aff'd. (1906) 148 Fed. Rep. 1021; Cincinnati &c. R. Co. *v.* Interstate Commerce Commission (1895) 162 U. S. 184, 196.

[23]Chisholm *v.* Georgia (1793) 2 Dallas 419, 477.

There should be no wrong done by one citizen to another, for which the Courts of justice will not, in due course, afford a speedy remedy.

"Ubi jus, ibi remedium," was a maxim of the common law. The twentieth century ought not to be less civilized than the sixteenth.

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